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No. 03-153

IN THE

Supreme Court of the United States

DISCOVERY HOUSE, INC.,
Petitioner,

v.

CONSOLIDATED CITY OF INDIANAPOLIS AND METROPOLITAN BOARD OF ZONING APPEALS OF MARION COUNTY, INDIANA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

DAVID A. STRAUSS *
1111 East 60th Street
Chicago, IL 60637
(773) 702-9601

DAVID C. JENSEN
JOHN P. TWOHY
MICHAEL P. MULCHAY
EICHHORN & EICHHORN
200 Russell Street
Hammond, IN 46320
(219) 931-0560

* Counsel of Record

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Respondents try to recharacterize the holding of the court of appeals. They assert—wrongly—that the court of appeals understood that compensatory damages are available under the ADA and the Rehabilitation Act, and that the court overturned the jury verdict in favor of Discovery House because Discovery House is "a for-profit corporation that does not itself claim to be disabled" (Br. in Op. 3). Respondents' characterization of the court of appeals' holding is incorrect; and even if it were correct, it would not make this case any less worthy of this Court's review.

1. In the courts below, respondents did not advance the argument on which the court of appeals ultimately relied. Instead, respondents' principal argument was that a firm like Discovery House—which is not itself a disabled individual,

but which proved that it was discriminated against because of its association with disabled individuals—could not assert rights under the relevant provisions of the ADA and the Rehabilitation Act. See Pet. App. 14a-15a; 54a-58a; Resp. C.A. Br. 20-27.

Respondents renew that argument before this Court. See Br. in Op. 4. This issue has been frequently litigated and extensively discussed in the courts of appeals. See, *e.g.*, *Innovative Health Systems, Inc. v. City of White Plains*, 117 F. 3d 37, 46-48 (2d Cir. 1997). But every court of appeals that has addressed this issue has decided it against respondents' position. See *ibid.*; *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F. 3d 35, 46 n.2 (2d Cir. 2002); *MX Group, Inc. v. City of Covington*, 293 F. 3d 326, 333-35 (6th Cir. 2002).

The court below, evidently mindful of these other court of appeals decisions (see Pet. App. 4a), did not deny that Discovery House has rights under the ADA and the Rehabilitation Act; instead, it took issue with the remedy that Discovery House sought. But as we demonstrated in the petition, the court of appeals' holding on the remedy issue—that Discovery House could not recover compensatory damages—is also in conflict with the decisions of several other courts of appeals, and is inconsistent with the logic of this Court's decisions. See Pet. 9-13.

Respondents now assert that the court of appeals recognized that compensatory damages are available under the ADA and the Rehabilitation Act. This is false. The court of appeals made an obscure reference to "the principle of *Bell v. Hood*" Pet. App. 6a), but it never made the slightest attempt to reconcile its ruling with the many other court of appeals decisions that have held that compensatory damages are available under the ADA and the Rehabilitation Act, or with the decisions of this Court that compel the same conclusion.

According to respondents, the decision below was, instead, crucially based on the fact that Discovery House is not itself a disabled individual. But this is a shell game. If (as respondents now assert) the basis of the ruling below is that Discovery House is not entitled to relief under the ADA and the Rehabilitation Act because it is not itself a disabled individual, then the decision below is squarely and indisputably in conflict with the decisions of at least two other courts of appeals. If (as we believe) the court below assumed that Discovery House *is* entitled to relief under those statutes, then its decision is in conflict with the many other courts of appeals (see Pet. 9-10 (citing cases)) that have held that compensatory damages are an appropriate form of relief.

2. Respondents also suggest that there is something peculiar about damages for lost profits, as opposed to other forms of compensatory damages, that justifies the decision below. Indeed, at one point, respondents, attempting to deny the existence of a clear conflict between the court below and the Sixth Circuit, suggest that "the amount of damages sought" might be a permissible basis for distinguishing the cases (Br. in Op. 5).

Needless to say, the decision below cannot be reconciled with other court of appeals decisions by simply identifying some factual particular in which it differs from those decisions; there must be a principled basis for distinguishing the cases. "[T]he amount of damages sought" is obviously not a basis for such a distinction. And as we explained in the petition, the fact that Discovery House received damages for lost profits also does not differentiate this case from others in which compensatory damages were awarded—except to the extent that, for reasons we identified (see Pet. 11-13), it makes Discovery House's claim to compensatory damages especially strong.

3. Respondents attempt to defend the court of appeals' decision on the Equal Protection issue by invoking *City of*

Cuyahoga Falls v. Buckeye Community Hope Foundation, 123 S. Ct. 1389 (2003). See Br. in Op. 5-8. But in *Cuyahoga Falls*, the Court explicitly noted that there was evidence only of private bias, and "no evidence suggesting that the[] official acts were themselves motivated by racial animus." 123 S. Ct. at 1394. Here, by contrast, there was—as the district court carefully recounted, in its opinion denying summary judgment—abundant evidence on which the jury could base its conclusion that respondents acted out of impermissible motives. See Pet. App. 29a-34a; Pet. 17. In fact, the contrast between *Cuyahoga Falls* and this case is especially clear: In *Cuyahoga Falls*, the government officials had, at every step, merely "acted pursuant to the requirements of [the city] charter" (123 S. Ct. at 1394); here, the City's own officials (and the Indiana Court of Appeals) concluded that respondents violated the City's zoning ordinance.

For these reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID A. STRAUSS *
1111 East 60th Street
Chicago, IL 60637
(773) 702-9601

DAVID C. JENSEN
JOHN P. TWOHY
MICHAEL P. MULCHAY
EICHHORN & EICHHORN
200 Russell Street
Hammond, IN 46320
(219) 931-0560

* Counsel of Record

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